Supreme Court, U. S.
FILED
MAY 5 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1754

THE JOINT MEETING OF ESSEX AND UNION COUNTIES,
Petitioner,

v.

NATIONAL SEA CLAMMERS ASSOCIATION, GOSTA LOVGREN, CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMANN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESTER, DEPT. OF ENVIRONMENTAL FAC. and CITY OF LONG BEACH AND CITY OF GLEN COVE,
Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

The Joint Meeting of Essex and Union Counties, the petitioner herein, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this matter on February 5, 1980.

Opinions Below

The February 5, 1980 opinion and judgment of the United States Court of Appeals for the Third Circuit is unreported and is reprinted in the Appendix* hereto, infra pp. 1a, *et seq.* and 37a *et seq.* respectively. The prior opinion and judgment of the United States District Court for the District of New Jersey, unreported is also reprinted in the Appendix, hereto, infra pp. 49a *et seq.* and 68a *et seq.* respectively.

Jurisdiction

The jurisdiction of the Court of Appeals was pursuant to 28 U.S.C. Section 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

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* Appendix references are to Appendix accompanying the Petition for a Writ of Certiorari *Re: Middlesex County Sewerage Authority, et al.* v. *Natural Sea Clammers Association, et al.* filed in this Court on April 29, 1980, No. 79-1711.

Questions Presented for Review

1. Whether plaintiffs are precluded from instituting a civil action pursuant to the Federal Water Pollution Control Act as amended (FWPCAA), 33 U.S.C. Section 1251 *et seq.*, and the Marine Protection Research and Sanctuaries Act (MPRSA), 33 U.S.C. Section 1401 *et seq.*, in light of their failure to give the statutory sixty (60) day notice of intention to sue provided in the said Acts, 33 U.S.C. Sections 1365(b) and 1415(g).

2. Whether the citizens' suit provisions of the FWP CAA, 33 U.S.C. Section 1365(e) and the MPRSA, 33 U.S.C. Section 1415(g) provide an alternate basis for suit by a private citizen in conjunction with 28 U.S.C. Section 1331, the general federal question jurisdiction of the Judicial Code, for the alleged injuries sustained from ocean pollution based upon federal common law nuisance against a state government agency engaged in sewage disposal.

3. Whether a private citizen has standing to maintain a federal common law nuisance action for alleged damages sustained resulting from ocean pollution as a general federal question under 28 U.S.C. Section 1331.

4. Whether plaintiffs' failure to serve a New Jersey state sewerage agency with timely notice of claim as required by the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, precludes them from instituting a suit in federal court under an alternative federal statutory or common law basis.

Constitutional and Statutory Provisions Involved

The Constitutional and Statutory provisions involved in this case are as follows: The Eleventh Amendment to the Constitution of the United States; the Federal Water Pollution Control Act as amended, 33 U.S.C. Section 1251 *et seq.;* The Marine Protection Research and Sanctuaries Act, 33 U.S.C. Section 1401 *et seq.;* The general federal question jurisdiction of the Judicial Code, 28 U.S.C. Section 1331 and the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* The pertinent text of the constitutional and statutory authorities is set forth in the Appendix, hereto, infra pp. 71a, *et seq.*

Statement of the Case

On January 14, 1977, plaintiffs, National Sea Clammers Association and Gosta Lovgren, on their own behalf and on behalf of a class of others allegedly similarly situated, commenced the instant action against the Joint Meeting of Essex and Union Counties (Joint Meeting), an assembly of the members of the various municipalities comprising the counties of Essex and Union formed pursuant to N.J.S.A. 40:63-68, and other defendants. Altogether, there were twenty-one (21) entities named as defendants, which included various Federal, State and local officials and governmental departments that are charged with environmental protection and which are responsible for sewerage treatment and disposal.

Essentially, plaintiffs alleged in their complaint that the discharge of effluent and the dumping of sludge resulting from sewerage treatment by the municipal defendants had caused damage to the clam, oyster and lobster beds in the Atlantic Ocean. The plaintiffs' complaint al-

leged that the Federal and State defendants have also caused damage to said beds by failing to carry out a series of statutory and constitutional duties designed to maintain pollution within certain respectable limits. Plaintiffs additionally alleged that, since they are members of the class and purport to represent a class comprised of commercial fisherman engaged in the harvest of clams, oysters, lobsters and fish in the Atlantic Ocean, they have the requisite standing to bring such an action.

The jurisdictional grounds alleged by the plaintiffs which have survived the Appellate review of the dismissal of the complaint by the District Court are the Federal Water Pollution Control Act, as amended, 33 U.S.C. Section 1251, *et seq.* (FWPCAA), the Marine Protection Research and Sanctuaries Act of 1972, as amended, (MPRSA), 33 U.S.C. Section 1401 *et seq.*, 28 U.S.C. Section 1331(a), 28 U.S.C. Section 1333 and 42 U.S.C. Section 1983. Jurisdiction over the appeal of the District Court judgment to the Court of Appeals was pursuant to 28 U.S.C. Section 1291.

The allegations made by the plaintiffs in their complaint against the petitioner, Joint Meeting, and which have survived the Appellate review are essentially that the Joint Meeting created and maintained a federal public nuisance resulting from the discharge of effluent and the dumping of sludge into New York Harbor and the Atlantic Ocean and that the Joint Meeting operated outside the scope of permits issued by various governmental authorities in direct violation of the FWPCAA and MPRSA, thereby allowing the plaintiffs to commence a citizens' suit.

With respect to the aforesaid tort claims asserted against them, the petitioner and the other defendants moved to dismiss the plaintiffs' claims for lack of subject

matter jurisdiction in light of the fact that plaintiffs' failed to provide a notice of their claims to the defendants as required by the FWPCAA, MPRSA and the New Jersey Tort Claims Act. The defendants also urged that the plaintiffs, as private citizens, lacked the requisite standing to institute that part of the instant action based upon the federal common law of nuisance. The disposition of the issues presented on defendants' motions to dismiss by the Courts below was as follows.

With respect to the plaintiffs' failure to comply with the notice requirements of the FWPCAA, MPRSA and the New Jersey Tort Claims Act, the District Court held that such failure deprived it of jurisdiction to entertain the plaintiffs' claims thereunder. The Court of Appeals, while agreeing that strict adherence to the Acts' notice provisions was required, still held that the District Court erred in holding that failure to comply with said notice provisions created an absolute bar to plaintiffs' suit to enforce the provisions of the Acts. Relying upon the "savings clauses" contained in the citizens' suit provisions of the Acts, the Court of Appeals reversed the decision of the District Court holding that the absence of notice was not fatal because the "savings clause" preserved any existing right of action under statute or common law.

Regarding plaintiffs' contention that they could maintain the instant litigation independent of any right pursuant to the savings clauses of the FWPCAA and MPRSA under the theory of federal common law nuisance, the District Court held, relying primarily on *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), that this avenue of relief was not available to private citizens. The Court of Appeals reversed the decision of the District Court holding that the common law nuisance remedy was available in Federal Court suits by private parties.

Defendants' contention that the plaintiffs' failure to comply with the notice requirements of the New Jersey Tort Claims Act was also upheld by the District Court. The Court of Appeals affirmed the determination of the District Court but in doing so added that plaintiffs' failure to comply with the requirements of the State Tort Claims Statutes did not preclude them from bringing suit if an alternative basis for suit against the defendants was pleaded based upon its determination that State Tort Claims Acts may not pre-empt federal statutory or common law causes of action.

REASONS FOR GRANTING THE WRIT

I

Certiorari should be granted to resolve conflicts in principal among lower Courts.

A. The holding of the Court of Appeals that plaintiffs' failure to comply with the notice to sue provisions of the FWPCAA and the MPRSA did not create an absolute bar to plaintiffs' suit to enforce the provisions of the Acts conflicts with other Circuit and District Court opinions thereby requiring review by this Court.

Under pertinently applicable provisions of the FWPCAA, private citizens may commence a civil action on their own behalf against anyone who fails to comply with an effluent standard, limitation or order issued under the Act. 33 U.S.C. Section 1365(a)(1). However, a private citizen is precluded from the institution of such an authorized civil action, unless notice specifying the standard, limitation or order allegedly violated has been given at least sixty (60) days prior to the commencement of the action to the Administrator, the State in which the al-

leged violation occurs and to any alleged violator of the standard, limitation or order. 33 U.S.C. Section 1365(b). Substantially similar citizens' suit provisions and notice requirements are contained in the MPRSA. 33 U.S.C. Section 1415(g).

In its opinion below, the District Court concluded that the plaintiffs had failed to give notice to any defendant which satisfied the FWPCAA or MPRSA requirements. Any notice which may have been given, however, was untimely and failed to specify any standard, limitation, order or statutory section which were alleged to be violated. The District Court held that, pursuant to the decision in *Loveladies Property Owners Ass'n* v. *Raab,* 430 F. Supp. 276 (D.N.J. 1975), *aff'd mem.* 457 F. 2d 1162 (3d Cir. 1976), *cert. den.* 432 U.S. 906 (1977), strict compliance with the notice provisions of the FWPCAA and MPRSA was required and, therefore, the Court did not have jurisdiction over any claims brought pursuant to the citizens' suit provisions of these Acts. The Court of Appeals agreed that it should not depart from these holdings.

The District Court went on in its opinion to examine the position of the plaintiffs that 28 U.S.C. Section 1331 provides an alternative basis for jurisdiction by virtue of the savings clauses of the FWPCAA and MPRSA, 33 U.S.C. Section 1365(e) and 33 U.S.C. Section 1415(g), respectively. Using 33 U.S.C. Section 1356(e) as a model, the savings clauses of these Acts essentially provides:

> Nothing in this Section shall restrict any right which any person (or class of persons) may have under any Statute or Common Law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State Agency).

Plaintiffs contend that the savings clauses of these Acts implies a right of action for private citizens to enforce these Acts without the necessity of complying with the notice requirements contained therein.

In its opinion, the District Court noted that the Circuits have differing opinions as to whether the citizens' suit provisions of the FWPCAA and MPRSA provide an exclusive jurisdictional basis for private actions to enforce the provisions of said Acts. The D.C. and Second Circuits have held that the citizens' suit provisions are not exclusive, thereby allowing jurisdiction to be predicated alternatively on 28 U.S.C. Section 1331 without the necessity of complying with the notice requirements attendant to the citizens' suit provisions. *Natural Resources Defense Council, Inc.* v. *Train,* 510 F. 2d 692 (D. C. Cir. 1974), *Natural Resources Defense Council, Inc.* v. *Calloway,* 524 F. 2d 79 (2d Cir. 1975). In *City of Highland Park* v. *Train,* 519 F. 2d 681 (7th Cir. 1975), the Seventh Circuit held that the citizens' suit provisions of the Clean Air Act, which parallel those of the FWPCAA and MPRSA, provided the sole jurisdictional basis for private actions to enforce the environmental legislation. The District Court also noted that a District of New Jersey case had followed the lead of the D.C. and Second Circuits on this issue. *Township of Long Beach* v. *City of New York,* 445 F. Supp. 1203 (D.N.J. 1978). Relying upon the Seventh Circuit's analysis and holding in *Highland Park, supra,* the District Court concluded that the savings clause of the citizens' suit provisions in the FWPCAA and MPRSA may allow an alternative basis for jurisdiction pursuant to 28 U.S.C. Section 1331 but not to the extent that any causes of action based thereon would not have to comply with the notice requirements of the citizens' suit provisions.

In its opinion, the Court of Appeals agreed with the parties and the District Court that there is a difference of opinion among the various Federal Courts on the issue of whether the "savings clauses" of the FWPCAA and MPRSA establish a separate and distinct jurisdictional basis for actions authorized pursuant to the citizens' suit provisions of those Acts. However, contrary to the opinion of the District Court, the Court of Appeals considered the holdings in the D.C. and Second Circuit to be more persuasively reasoned than that of the Seventh Circuit and, therefore, held that such a separate and distinct jurisdictional basis in fact existed.

It is interesting to note that while the Court of Appeals based is conclusion upon "more persuasively reasoned cases", it does not indicate why the reasoning of those D.C. and Second Circuit cases justify and susbtantiate its conclusion. Based upon the agreement of the Court of Appeals that the citizens' suit provisions of the FWPCAA were modeled after the citizens' suit provision of the Clean Air Act, 42 U.S.C. Section 7604, (App. pp. 4a, n1), it would seem more logical that the Court of Appeals would follow the reasoning in *Highland Park, supra,* which specifically dealt with the relationship of the savings clause and citizens' suit provisions in the Clean Air Act. Relying upon the legislative history of the Clean Air Act, the Court in *Highland Park, supra,* pertinently noted that the legislative history:

> "Shows Congress's determination that citizen participation in the enforcement of standards and regulations under the Clean Air Act of 1970 be established. It also shows, however, that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened federal courts and most likely to trigger govern-

> mental action which would alleviate any need for judicial relief. It was in response to these concerns that the statutory notice provisions were included in Section 304. Congress's intention would be frustrated if the statutory mandate of Section 304(d) were ignored." 519 F. 2d at 690-691.

The Court ultimately concluded that the savings clause of the Clean Air Act

> expressing the general intention of Congress not to disturb existing rights to seek relief does not have the affirmative effect of removing conditions which existing law imposes upon the exercise of those rights. 519 F. 2d at 693.

It is respectfully submitted that the rationale applied in *Highland Park, supra,* is extremely applicable to the similar provisions of the FWPCAA and MPRSA and is much more persuasively reasoned than those cases relied upon by the Court of Appeals.

Notwithstanding the contention herein that the Court of Appeals erroneously concluded that plaintiffs' failure to comply with the notice to sue provisions of the FWP CAA and the MPRSA did not create an absolute bar to the institution of suit to enforce the provisions of the Acts, the evident public policy implications of such a decision and the recognized conflicting opinions among the Courts of Appeals on this issue provides a more than sufficient basis for this Court to grant the writ of certiorari requested herein.

B. The holding of the Court of Appeals that a private citizen has standing to maintain an action based upon a federal common law of nuisance theory under 28 U.S.C. Section 1331 for alleged damages sustained as a result of ocean pollution conflicts with opinions of the federal courts thereby rendering review by this Court highly desirable.

In complete reliance on the holding of the Supreme Court in *Illinois* v. *City of Milwaukee,* 406 U.S. 91 (1972), the District Court emphatically and unhesitatingly held that private parties do not have a right to institute an action in federal common law of nuisance for water pollution, thereby depriving the instant plaintiffs of standing to raise their federal common law of nuisance claim against the petitioner. Contrary to the holding in the District Court and in conflict with the decisions of other Courts of Appeals and federal courts as well, the Third Circuit held that a cause of action in federal common law of nuisance for water pollution did extend to private parties.

The principle issue before the Court in *Illinois* v. *City of Milwaukee, supra,* was "whether pollution of interstate or navigable waters creates an action arising under the 'laws' of the United States within the meaning of Section 1331(a)." 406 U.S. 91 at 99. In holding that such an action does arise pursuant to Section 1331(a), thereby affording the State of Illinois a remedy for pollution of its waters emanating from beyond its borders, the Court pertinently stated:

> As the field of federal common law has been given necessary expansion into matters of federal concern and relationship (where no applicable federal statute exists, as there does not here), the ecological rights of a State in the improper impairment of them from sources outside the State's own ter-

> ritory, now would and should, we think, be held to be a matter having basis and standard in federal common law and so directly constituting a question arising under the laws of the United States. 406 U.S. at 99-100.

The holding above did not allow for such a cause of action brought by plaintiffs other than a state.

Several cases subsequent to *Illinois* v. *Milwaukee, supra,* have extended the federal common law of nuisance action beyond actions brought by state plaintiffs to include those brought by the United States. See, e.g., *United States* v. *Ira S. Bushey & Sons, Inc.,* 346 F. Supp. 145 (D. Vt. 1972) 363 F. Supp. 110 (D. Vt. 1973), *aff'd* 487 F. 2d 1393 (2d Cir. 1973), *cert. den.,* 417 U.S. 976, 94 S. Ct. 3182, 41 L. Ed. 2d 1146 (1976); *United States* v. *United States Steel Corp.,* 356 F. Supp. 556 (N.D. Ill. 1973); *United States* v. *Stocco Homes, Inc.,* 489 F. 2d 597 (3d Cir. 1974), *cert. den.* 420 U.S. 927, 95 S. Ct. 1124, 43 L. Ed. 2d 397 (1975). However, in the case of *Committee for the Consideration of the Jones Falls Sewerage System* v. *Train,* 375 F. Supp. 1148 (D. Md. 1974), aff'd on other grounds consistent with that of the District Court on the instant issue, 539 F. 2d 1006 (4th Cir. 1976), the Court concluded that an individual citizen could not bring an action based upon the theory of federal common law of nuisance. The District Court clearly indicated that a cause of action in Federal common law of nuisance was found to exist in *Illinois* v. *Milwaukee, supra,* because of the "character of the plaintiffs as governmental units." 375 F. Supp. at 1153. Solidifying the holding of the District Court, the Court of Appeals for the Fourth Circuit pertinently noted:

> Perhaps with the exception of actions by the United States to abate public nuisances created in navigable waters by polluters, (citations omitted) but

> consistent with Section 1251(b) [FWPCAA] the doctrine of *Illinois* v. *Milwaukee* has not been extended beyond the abatement of public nuisance in interstate controversies where the complainant is a state and the defenders are creating extra territorial harm. 539 F. 2d at 1009.

Similar support for precluding private citizens from instituting causes of action based upon the federal common law of nuisance is evident in *Parsell* v. *Shell Oil Company,* 421 F. Supp. 1275 (D. Conn. 1976), *aff'd,* without opinion sub nom. *East End Yacht Club, Inc.* v. *Shell Oil Company,* 573 F. 2d 1289 (2d Cir. 1977).

In its holding that the instant private plaintiffs were not precluded from instituting a cause of action based upon federal common law of nuisance, the Court of Appeals relied heavily upon footnote 6 in *Illinois* v. *Milwaukee,* 406 U.S. at 105, which stated in pertinent part:

> Thus it is not only the character of the parties that requires us to apply federal law . . . [W]here there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interest of federalism, we have fashioned federal common law.

In essence, the Court of Appeals opined that the language of said footnote would allow a non-sovereign to institute a federal common law of nuisance action if the substantive federal question to be considered requires federal uniformity. The contra holding in *Committee for the Consideration of the Jones Falls Sewerage System* v. *Train, supra,* regarding the same footnote, "that there were other federal interests which in addition to the character of the parties required the application of federal law although those other interests in themselves would not have been

sufficient", 375 F. Supp. at 1154 n. 12, is the more persuasive analysis of the intent of the *Illinois* Court.

It is respectfully submitted that the foregoing analysis not only serves as a more persuasive basis that the instant plaintiffs lack standing to institute a cause of action based upon federal common law of nuisance, but also points out a glaring conflict of opinion among the Federal Courts regarding this question which should be scrutinized and settled by this Court.

II

Certiorari should be granted where a Court of Appeals has decided an important state issue in conflict with applicable State Law.

A. The holding of the Court of Appeals that the plaintiffs' failure to serve a New Jersey State Sewerage Agency with timely notice of claim pursuant to the New Jersey Tort Claims Act does not immunize said State Sewerage Agency from being sued in Federal Court under an alternative federal, statutory or common law basis is contra to the doctrine of sovereign immunity addressed by said State law, thereby calling for review by this Court.

Plaintiffs' failure to give notice to the petitioner regarding its intent to sue pursuant to the dictates of the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.*, resulted in the conclusion of the District Court that the plaintiffs are forever barred from bringing their tort claims against the petitioner. The Court of Appeals affirmed the decision of the District Court but only to the extent that plaintiffs' failure to comply with the notice requirements of the Act only precluded them from bringing suit pursuant to the Act. The Court of Appeals

concluded that the New Jersey Tort Claims Act "may not pre-empt federal, statutory or common law causes of action". It is conceded that this conclusion of the Court of Appeals is correct only to the extent that it applies to actions seeking injunctive relief which are not protected by the New Jersey Tort Claims Act, as actions for damages are. See N.J.S.A. 59:1-4.

In order to provide for the compensation of injuries negligently caused by public entities, the Legislature enacted the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* The basic policy expression of the Tort Claims Act is contained in N.J.S.A. 59:1-2 which provides in full as follows:

> The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity. On the other hand, the Legislature recognizes that while a private entrepreneur may readily be held liable for negligence within the chosen ambit of his activity, the area within which government has the power to act for the public good is almost without limit and therefore government should not have the duty to do everything that might be done. Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this Act and in accordance with the fair and uniform principles established herein. All of the provisions of this Act should be construed with a view to carry out the above legislative declaration.

Pursuant to the inherent policy provisions of the New Jersey Tort Claims Act, "recovery against a public entity

may be had, but only within the strict authority and policies guiding its interpretation. *Polyard* v. *Terry,* 160 N.J. Super. 497, 506 (App. Div., 1978) and cases cited therein. Thus, there can be "no liability except as provided by the Act". *McGowan* v. *Borough of Eatontown,* 151 N.J. Super. 440, 446 (App. Div. 1977) and cases cited therein.

Through the New Jersey Tort Claims Act, the Legislature re-established the concept of sovereign immunity but granted a waiver of that immunity pursuant to the circumstances and conditions set forth in the Tort Claims Act In establishing these conditions, the Legislature required that in order for an action to be brought against a public entity under the Act, notice of a claim must be given to the public entity by the claimant within ninety (90) days of the accrual of the cause of action. N.J.S.A. 59:8-8. In addition thereto, the Legislature provided a discretionary right on the part of the Superior Court to permit the filing of a late notice of claim any time within one (1) year after the accrual of a cause of action for good cause shown, provided that the public entity has not been substantially prejudiced thereby. N.J.S.A. 59:8-9. However, if a notice of claim still has not been filed within the discretionary one (1) year period, then "the claimant shall be forever barred from recovering against the public entity." N.J.S.A. 59:8-8.

There can be no dispute that plaintiffs' claim for damages pursuant to theories of maritime tort, federal common law of nuisance or other federal claims arising under the FWPCAA or MPRSA are substantively equivalent and all represent claims for damages as a result of alleged tortious conduct. There is also no dispute that no notice of claim was provided to the petitioner at any time whatsoever by the plaintiff and no timely application for

leave to file a late claim was made at any time either within one (1) year after the cause of action accrued or thereafter. For these reasons, then, the District Court concluded that the plaintiffs were forever barred from bringing their tort claims against the petitioner. The District Court's decision was not limited to actions arising under the New Jersey Tort Claims Act, but encompassed all plaintiff's claims based upon the alleged tortious conduct of the petitioner. This conclusion is consistent with *Richie* v. *Cahall,* 386 F. Supp. 1207 (D.N.J. 1974), wherein the Court held that pursuant to the Tort Claims Act the State may not be impleaded as a third party defendant in an auto accident suit in a diversity case.

As previously noted, the Legislature in the Tort Claims Act re-established sovereign immunity but then granted conditioned waivers thereto. "It is a firmly established rule in American jurisprudence that acts in derogation of sovereign immmunity are to be strictly construed and that provisions which are conditions which the sovereign attaches to the waiver of immunity are jurisdictional". *Pinckney* v. *City of Jersey City,* 140 N.J. Super. 96, 100 (Law Div. 1976). The Court in *Pinckney,* concluded that it was without jurisdiction to entertain a claim against the City of Jersey City where a claim was not filed within ninety (90) days of the accident and leave to file late notice was not sought until more than one (1) year after the accident. As a basis for its conclusion, the Court therein relied on a federal court case, *Rao* v. *Port of New York Auth.,* 122 F. Supp. 595 (E.D.N.Y. 1954) *aff'd* 222 F. 2d 362 (2d Cir. 1955), wherein the Court granted a motion to dismiss by the Port Authority due to plaintiff's failure to comply with the statutory conditions under which the Port Authority consented that it may be sued.

In light of the foregoing analysis, then, it is respectfully submitted that the conditions for the filing of suit

prescribed by the New Jersey Tort Claims Act apply to any and all types of alleged tortious conduct on the part of the public entity, regardless of whether those claims arise under State or federal statutory or common law. Compliance with the preconditions for suit under the New Jersey Tort Claims Act are jurisdictional and failure to comply therewith forever bars suit against the public entity. It is difficult to conceive how the Court of Appeals can preclude a cause of action for failure to comply with the notice provisions of the New Jersey Tort Claims Act on the one hand but allow suit against the same public entity under federal, statutory and common law theories for the same tortious acts of the public entity on the other hand. It is for this reason that this Court is respectfully requested to issue its writ to review and settle this conflict of analysis of State Law and sovereign immunity.

CONCLUSION

Wherefore, petitioner respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

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